

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

ePLUS, INC.,
Plaintiff,
v.
LAWSON SOFTWARE, INC.,
Defendant.

:
:
:
:
: Civil Action
: No. 3:09CV620
:
: January 27, 2010
:

COMPLETE TRANSCRIPT OF **THE MARKMAN HEARING**
BEFORE THE HONORABLE ROBERT E. PAYNE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

Scott L. Robertson, Esq.
Jennifer A. Albert, Esq.
GOODWIN PROCTOR
901 New York Avenue, NW
Washington, D.C. 20001

Craig T. Merritt, Esq.
CHRISTIAN & BARTON
909 E. Main Street, Suite 1200
Richmond, VA 23219-3095

Counsel for the plaintiff ePlus

DIANE J. DAFFRON, RPR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT

1 Court.

2 THE COURT: Let me ask you this question:
3 Why is it that there are 12, 13, 14 different column
4 citations in there and lines? And how do they fit
5 together? And why do I need to have so many of them?
6 Why is it that you can't point to one of them and say
7 "This is the structure"?

8 MR. ROBERTSON: Because --

9 THE COURT: Because you're making me guess
10 what all of that means or discern what all that means
11 and how it is a structure, and it sort of doesn't
12 exactly mesh together in a way that's readily
13 understood.

14 MR. ROBERTSON: I appreciate the Court's
15 frustration with the difficulty of distilling the
16 structure from the specification. Of course, the
17 specification was written to speak to one of ordinary
18 skill in the art, and I appreciate that the Court is
19 not one of ordinary skill in the art. So we have tried
20 to assist the Court in identifying that structure.

21 THE COURT: You're not one of ordinary skill
22 in the art either.

23 MR. ROBERTSON: I'm not, Your Honor.

24 THE COURT: So I can't use your brief?

25 MR. ROBERTSON: Well, my brief is -- I've

1 the text suggests that it is a sequence.

2 That's not what's done here. What's done is
3 there's a jump from one column and line reference in
4 one place to another column and line reference in
5 another place. And if you read the column and line
6 references, there's no connection between the first
7 entry and the second entry in the patent.

8 Where is that connection being made? That
9 connection is being made in your argument. Most of the
10 time not in the brief but in the oral argument and in
11 the slides. And that's what happens. And,
12 unfortunately, I don't think it fits the bill here.

13 Don't you think maybe we ought to start all
14 over again and go back and do it right?

15 MR. ROBERTSON: No, Your Honor.

16 THE COURT: And this may be -- I don't want
17 you to take this as personal criticism because I will
18 tell you, you're not the only one who's doing this.
19 But when you see it time after time, and you see sort
20 of the madness of trying to do what the Court of
21 Appeals wants us to do by all this cobbling together,
22 what you begin to realize is you're writing patents for
23 people and saying things about their structure on the
24 basis really of things that aren't in the record.
25 Because you can't connect cobble piece No. 1 to cobble

1 stone No. 2 except by way of reference to what the
2 lawyers are telling you.

3 And then you pick the best that makes the
4 most sense to you, but it doesn't necessarily really
5 always fit the patent. And I'm trying to get out of
6 that mode and get something that really gets back to
7 what the Federal Circuit asks us to do. And it sort of
8 seems to me that maybe it's time to retrench and start
9 again and do what you're doing here but do it in the
10 briefs in a textual way. And what I think will happen
11 is if we do that, you will realize that your
12 obligations under Rule 11, and intellectual honesty
13 generally, will cause you to say, because you're being
14 made to focus this way, and just logic will compel you
15 to the conclusion, Well, yeah, maybe these are the
16 descriptions of the structure. And it will be one,
17 two, three or four small items instead of this cobbled
18 together thing of six items that have some connection
19 in the mind of some expert.

20 I did not mean to suggest you violated any
21 rules in saying that.

22 MR. ROBERTSON: I thank you, Your Honor, for
23 that.

24 I do appreciate the Court's observation and
25 certain that, in your words, we have to cobble

1 things is going to make you focus in a way you haven't
2 focused before.

3 MR. ROBERTSON: I also observe, Your Honor,
4 that perhaps you're suggesting that this is something
5 that might require expert testimony.

6 THE COURT: It might.

7 MR. ROBERTSON: Maybe I can make a
8 suggestion.

9 THE COURT: It might.

10 MR. ROBERTSON: Perhaps we need an expert
11 affidavit that says why this structure is appropriate
12 for ePlus's constructions and Lawson's is not and uses
13 the structures as a road map to walk the Court through
14 to say this is what the essence of these constructions
15 are.

16 We can do that now as part of our briefing or
17 we can defer on that, Your Honor, and do it as part of
18 any trial of this matter when these elements are being
19 discussed.

20 THE COURT: You want me to construe the claim
21 while the jury is sitting out in the wings? I've tried
22 that and it doesn't work real well. I mean, on a
23 simple case. It was a machine.

24 MR. ROBERTSON: I guess I don't know where
25 the Court wants to go at this point.

1 THE COURT: I'm inclined to say let's start
2 over again. I don't want to put you needlessly to the
3 task of slaying trees and running up billable hours. I
4 don't believe that's right for your clients or not.
5 But I do believe that -- I believe we have kind of,
6 both sides, are missing -- as far as I'm concerned, the
7 other side is in the same basic position you're in
8 almost.

9 I think that we are where we are for several
10 reasons. And one is the patent was prepared before the
11 Ericcson decision was issued, and when the people were
12 preparing the patent they weren't necessarily preparing
13 it having in mind the need to satisfy that test. And
14 that creates a terrible problem for lawyers trying to
15 deal with cases. But I think it's a problem, I would
16 have thought it's a problem, that experts have dealt
17 with, too.

18 MR. ROBERTSON: Well, I think often expert
19 testimony is brought to bear, particularly on computer
20 software implemented inventions to identify the
21 structure disclosed. As they say, even in the Harris
22 case, they go through and point to a number of
23 different figures and columns and lines that they
24 cobbled together to come up with the two-step sequence.
25 I don't know if they had the benefit of expert

1 well.

2 So I'm happy to do what the Court wants. I
3 think I'd like to be able to deliberate and provide
4 supplemental briefing to Your Honor that supports what
5 we say the algorithm is with respect to that.

6 THE COURT: If we do that, will we then be
7 completed with the means-plus-function interpretation
8 construction process?

9 MR. ROBERTSON: I think so.

10 THE COURT: Do you think we need experts? I
11 mean, I don't think you do based on -- I'm not sure you
12 do based on the number of places that you cite, but if
13 do you, you don't have to decide today.

14 MR. ROBERTSON: Well, you know, Your Honor, I
15 had the benefit of trying this case twice, and I've
16 also had the benefit of having experts who have been
17 sitting with me and can walk through this and having
18 talented colleagues who have backgrounds in electrical
19 engineering and computer science.

20 So to me, having read this patent so many
21 times, I can kind of navigate through it, but I
22 understand the Court doesn't have the benefit of having
23 done that and shouldn't have to do it.

24 THE COURT: All right. But there are a
25 couple of things I think we can resolve now. One is

1 THE COURT: Sure.

2 MR. ROBERTSON: I understand a host, as
3 described in the patent, as being the supplier of the
4 goods.

5 THE COURT: I'm not sure how that works with
6 the catalog data. I would have thought that 236 would
7 have been up there next to the host computer and
8 connect with 210 and both of them directly or one or
9 the other would connect with the server.

10 MR. ROBERTSON: The host computer can
11 communicate to the local computer. The local computer
12 is communicating with the server so the data can be
13 transferred. It's being stored in the catalog
14 databases.

15 THE COURT: I see what you're saying. Well,
16 I think I do. It may be very ambitious of me to say I
17 understand. All right.

18 MR. ROBERTSON: Your Honor, I guess --

19 THE COURT: So local computer is a limitation
20 that comes from where?

21 MR. ROBERTSON: We don't think it's part of
22 the algorithm, Your Honor. It comes from Lawson.

23 THE COURT: Well, a local computer isn't a
24 step. A local computer is something you use to
25 accomplish one of the steps. It's just part of what

1 positions. But I think we're not quite there yet. And
2 I'm not going to blame you-all. I just believe it's
3 created because of the circumstances that I outlined
4 earlier.

5 If you can come up with some modification of
6 that approach that you think is a better way to present
7 all this in a simpler more direct form in a way that I
8 can convert into an opinion on this matter, then I'm
9 amenable to you all doing that as long as both of you
10 do it the same way.

11 So if I haven't come up with a very good way
12 of accomplishing it, you-all work it out and see what
13 you'd like to do, and call me and we'll talk about it.

14 I don't see the need for any more argument on
15 it or hearings, but if you-all feel as if, after
16 talking with each other, that I need testimony from
17 some expert or something, then you can let me know.
18 And I'm using the definition of "algorithm" that you
19 all had. I think it was in your section from the
20 Microsoft computer dictionary. I think that's a
21 reasonably accurate one. It looks like the Federal
22 Circuit uses it.

23 In this process, do you think we've limited
24 any of the claims that we're dealing with or going to
25 be dealing with in the patents? One of you cited a